CASE NO: 88 - 1599

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

****

October Term, 1988

****

FRANK J. VONDERSAAR, Petitioner

v.

JUDSON SHATTUCK, et al., Respondent

****

MEMORANDUM OF RESPONDENT, JUDSON SHATTUCK IN OPPOSITION TO PETITIONER FRANK J. VONDERSAAR'S PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Is petitioner entitled to a writ of mandamus from this court directing the District Court to rule on a request for a preliminary injunction in a case in which the magistrate of the District Court has already issued a report finding a lack of subject matter jurisdiction?

PARTIES TO THE PROCEEDING

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Caspar W. Weinberger

Elizabeth H. Dole

William Barney, III

Michal Varner

Judson Shattuck

Leslie J. Vondersaar nka Steadman

Jene Fuller

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Acton Corp. v. Borden, Inc.
670 F. 2d 377
(1982, 1st Cir.)..... 16.

Barber v. Barber
21 How. 582
(U. S., 1859)..... 14, 17.

Dist. Col. Court of Appeals v. Feldman,
460 U. S. 462 (1983).... 15, 17.

U. S. Code

28 U. S. C.
§1291..... 2.

28 U. S. C.
§1292..... 3.

Ohio Civil Rule

Civil Rule
R. 53 (E)(2)..... 1.

STATUTES AND RULES

INVOLVED IN THIS MATTER

OHIO CIV. RULE 53 (E) (2)

"(2) **Objections to Report.** A party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report. If objections are timely served and filed by any party, any other party may serve and file objections within ten (10) days of the date on which the first objections were filed, or within the time otherwise prescribed by this rule, whichever period last expires. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefor. Upon consideration of the objections the court may: adopt, reject or modify the report; hear additional evidence; return the report

to the referee with instructions; or hear the matter itself."

28 U.S.C. §1291 and 1292

"§1291. Final decisions of district courts

The court of appeals (0ther than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

§1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order,

if application is made to it within ten days after the entry of the order: **Provided, however,** That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals

for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case

may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court."

STATEMENT OF THE CASE

Petitioner filed a pro se action in the district court alleging a conspiracy among this Respondent and, inter alia, various agencies of the Federal government to deprive him of his alleged Constitutional interest in visitation rights with his daughter, whose custody has been placed with Petitioner's former wife.

This Respondent's part in the underlying decision in a Greene County, Ohio, divorce case, and hence the alleged conspiracy, was as a judge of the Greene County Common Pleas Court. On July 10, 1986, a Referee of the Greene County Domestic Relations Court filed a recommendation that Petitioner be denied visitation with his daughter. The recommendation was not objected to,

and hence not brought before this Respondent Judge, until a motion was filed by Petitioner herein to vacate the Referee's recommendation on April 25, 1988, well beyond the time allowed for filing objections to such Referee's recommendations by Ohio Civ. R. 53 (E)(2). This Respondent ruled against the motion to vacate on May 13, 1988. No appeal was taken to an Ohio court of appeals.

Instead, Petitioner filed the instant action on June 2, 1988, and subsequently filed a request for preliminary injunction on November 2, 1988, seeking visitation rights with his daughter pending a decision on the merits of his complaint.

The magistrate to which this case was referred decided, on November 18,

1988, various pending motions and ordered briefs to be submitted arguing, inter alia, the jurisdiction of the Federal courts. This Respondent was also ordered to file a summary judgment motion as to his defense based on judicial immunity, which he did on or about December 8, 1988. The magistrate issued a Report recommending that summary judgment in regard to both the injunctive relief request and the request for money damages be entered in this Respondent's favor on December 19, 1988. Objections were filed to this report by Petitioner in the District Court.

Notwithstanding and separate from the summary judgment motions pertaining to judicial immunity, Petitioner objected to the magistrate's request for memoranda pertaining to jurisdictional issues prior to deciding his request for a

preliminary injunction by "appealing" to a judge of the District Court on December 7, 1988. Only five days later, without action from the District Court, Petitioner, believing that the District Court had not decided his motion expeditiously, filed an appeal to the Sixth Circuit Court of Appeals from an alleged "de facto" final order denying his motion for preliminary injunction. The Court of Appeals, on motion of several Appellees, dismissed the appeal, finding a lack of jurisdiction for deciding such an appeal in that there was no final order from the District Court to appeal. The Court of Appeals suggested that the Petitioner's action was better styled as a mandamus action, but noted in passing that Petitioner was not entitled to that relief, either.

Petitioner then moved for rehearing

and for permission to amend his appeal to a petition for a writ of mandamus in the Court of Appeals. The Court of Appeals denied the rehearing, but did not rule on the request to amend. Petitioner then filed the instant petition for writ of mandamus in this Supreme Court of the United States.

ARGUMENT

The first step in any action brought in a Federal court is to determine whether those courts have jurisdiction over the action. Petitioner's original complaint pertains to an attempt to obtain visitation privileges with his daughter. The Federal courts have disclaimed jurisdiction in the field of divorce. Barber v. Barber 21 How. 582 (U. S., 1859). No rationale has been advanced by Petitioner as to why this disclaimer should not be followed in the instant case. Accordingly, no Federal court should exercise jurisdiction in this matter as it pertains to visitation with Petitioner's child.

In addition, the effect of what Petitioner seeks to do is to have the District Court review the decision

of the Greene County Common Pleas Court. This the Federal trial courts may not do. Dist. Col. Court of Appeals v. Feldman, 460 U. S. 462 (1983). The Federal trial courts are without authority to do this, and mandamus should not lie to order that the District Court exercise a non-existent power.

Assuming arguendo that the Federal system in general has jurisdiction and should exercise the same over the subject matter of the complaint, the matter is not ripe for decision by this court. If this is considered an appeal from the decision of the Court of Appeals, the District court entered no final order for the Court of Appeals to review, and therefore the Court of Appeals had no jurisdiction pursuant to 28 U.S.C. §1291 and 1292 to consider Petitioner's appeal. This

court should therefore affirm the Court of Appeals's order dismissing the appeal.

If this is considered a petition for a writ of mandamus, the action is both without merit and not ripe for decision. The action is without merit because a writ of mandamus will be granted at common law only when Petitioner is clearly entitled to the same. The party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. Acton Corp. v. Borden, Inc., 670 F. 2d 377 (1982, 1st Cir.).

In the instant case, Petitioner has not allowed the District Court sufficient time to decide his motion, as noted by the Court of Appeals decision and so the matter is not ripe for decision. The Magistrate's concern over subject matter jurisdiction and his

request for memoranda on that question before rendering a decision on the injunction request are perfectly reasonable, and Petitioner is unjustified in feeling that no decision will be rendered by the District Court once memoranda are submitted as ordered.

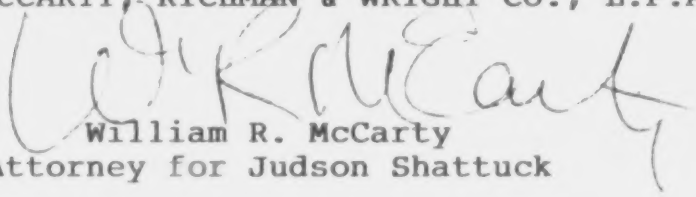
In addition, as argued above, the District Court has no jurisdiction under Feldman and Barber and therefore the Petitioner is not clearly and indisputably entitled to the relief he requests. For these reasons, the writ of mandamus should not issue on the merits of the request.

CONCLUSION

This Respondent urges this Court to deny Petitioner's request for a Writ of Mandamus and to return the case to the District Court.

Respectfully submitted,

MARTIN, McCARTY, RICHMAN & WRIGHT CO., L.P.A.



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CERTIFICATE OF

SERVICE

The undersigned hereby certifies that three copies of the within Memorandum of Judson Shattuck was mailed by regular U. S. Mail to the following:

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